# PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 76

THE UNITED STATES, PETITIONER

vs.

AMOS P. CARVER, A. E. TURNER, CLIFFORD E. CARVER, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1926.
CERTIORARI GRANTED APRIL 25, 1927.

(26250)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1927

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## No. 807

## THE UNITED STATES, PETITIONER

vs.

## AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Supreme Court of the United States

October term, 1927

No. ——

THE UNITED STATES, PETITIONER

v.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT BLANCHARD, P. B. Blanchard, James B. Parse, A. N. Blanchard, W. A. Blanchard

*Petition for a writ of certiorari to the Court of Claims*

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered December 19, 1927, in the amount of $113,216.00, with interest at 6% from May 9, 1918, until paid, which judgment amended a previous judgment and overruled a motion by the United States for a new trial and for additional findings.

STATEMENT

By an original and amended petition, the owners of the
2 sailing vessel "Betsy Ross" made claim that the United States Shipping Board, as agent for the President, during April or May, 1918, requisitioned the use of that vessel, then in the port of Melbourne, Australia, for carrying wheat to the United States and sought compensation by reason "of being deprived of the use of said ship." While building, her owners late in 1917 entered upon a charter party for carrying lumber from British Columbia to Melbourne, Australia, and simultaneously entered into a charter party for carrying a return cargo of chrome ore from the island of New Caledonia, 800 miles east of Australia, to Baltimore. The amount petitioners would have earned under the ore charter was $177,000.00. Following administrative regulations, both charter parties had the approval of the Shipping Board. Upon completing the lumber charter and after making repairs, the master applied to the Australian authorities for clearance, which was declined at the request of the Shipping Board, which had under consideration the carriage of wheat for the Food Administration from Australia to New York. Owners took up with representatives of the Shipping Board and the War Industries Board here the performance of the ore charter. These representatives concluded that wheat was a more important commodity and advised the owners to make arrange-
ments with the Food Administration for wheat; otherwise the
3 "Betsy Ross" would be requisitioned. Owners concluded, rather than have the vessel requisitioned, to carry wheat and

accordingly entered upon a charter party with the Food Administration, which was performed and the freight moneys there provided paid. The freight agreed upon therein was $63,784.00. The use of the "Betsy Ross" was not requisitioned by the Government. (Findings X, infra.)

However, the court determined that the act of June 15, 1917 (c. 29, 40 Stat. 182), conferred upon the President the power and authority to suspend and cancel contracts with respect to the operation of ships and provided compensation. They read the action of the Government in this case to be a cancellation or suspension of the ore charter within the meaning of that act and awarded compensation.

The pertinent provisions of the act are:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * * * *

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

* * * * * * *

"(c) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

* * * * * * *

4 "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

By appropriate Executive orders, the President delegated to the Emergency Fleet Corporation the powers and authority applicable to the construction of vessels, the purchase or requisition of vessels in the course of construction, or of contracts for construction of such vessels and the completion thereof, and to the Shipping Board the power and authority with respect to taking over of title or possession of constructed vessels or charters, to be exercised either directly by the board or through the Fleet Corporation. Clearly, the act in so

far as it provides for cancelling or suspending contracts relates, under clause (b), to contracts for the building, production, or purchase of ships or material. There was no requisition of the ore charter under clause (e). In fact, the Government did not take the use of the vessel under requisition. Rather than permit requisition, her owners entered upon the wheat charter. This prevented the performance of the ore charter. No reference to these charters is made by the petitions filed in the case.

ASSIGNMENTS OF ERROR

1. The Court of Claims erred in holding that there was a suspension or cancellation of the charter with the Mutual Chemical Company of America within the provisions of the act of June 15, 1917, and that compensation by reason of such suspension or cancellation follows.

2. The Court of Claims erred in granting judgment to the respondent.

REASONS FOR GRANTING THE WRIT

1. The ruling is in direct conflict with the accepted decisions of this court in the following cases: Omnia Company v. United States, 261 U. S. 502; Berg v. United States, 269 U. S. 535; American Smelting and Refining Company v. United States, 259 U. S. 75; and with Friend v. United States, 56 Ct. Cls. 423; Union Petroleum S. S. Co. v. United States (C. C. A. 2d Cir.), 18 F. (2d) 752 (certiorari denied, 274 U. S. 760).

2. A plain error has been committed by the Court of Claims in construing and applying the act of June 15, 1917. The application made of this statute is contrary to the general rulings adopted by the Government in the adjustment of many requisition claims for which liability always has been denied.

These considerations have impelled us to submit the case to the court for the exercise of its judicial discretion under rule 35 whether the writ should be issued or denied. Obviously, the rulings of the Court of Claims are erroneous. Although similar claims are not now in litigation, the Government has uniformly rejected large numbers of similar claims. The judgment in this case is for $113,216.66 with interest at 6% per annum from May 9, 1918, totaling nearly $180,000.00. Although the case may be of no general importance, we do not feel justified in acquiescing in a judgment for that amount, which appears to be without anything to support it.

Respectfully submitted.

WILLIAM D MITCHELL,
*Solicitor General.*

FEBRUARY, 1928.

7 In Court Claims of the United States

No. C–459

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT Blanchard, P. B. Blanchard, James B. Parse, A. N. Blanchard, W. A. Blanchard

vs.

THE UNITED STATES

I. *History of proceedings*

On April 25, 1923, the original petition was filed by Messrs. Dean & Scott, attorneys of record, in the name of Amos D. Carver.

On June 25, 1923, a general traverse was entered under rule 34.

On March 19, 1924, on motion made therefor, Frank E. Scott, Esq., was substituted as attorney of record.

On March 18, 1925, by leave of court, the plaintiffs filed their amended petition. Said amended petition is as follows:

II. *Amended petition*

Filed March 18, 1925

To the honorable CHIEF JUSTICE and the JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The plaintiffs, by their attorneys, for their petition herein, respectfully show to the court:

I

The petitioner, Amos D. Carver, at all times hereinafter mentioned was the managing owner of a certain ship or vessel called the "Betsy Ross," classed as 100 A–1, of the measurement of approximately 2,950 tons deadweight cargo capacity, and the ownership of said vessel was vested in the above-named plaintiffs in the following proportions: Amos D. Carver, $\frac{12}{64}$; S. E. Turner, $\frac{12}{64}$; Clifford N. Carver, $\frac{11}{64}$; A. N. Blanchard, $\frac{11}{64}$; W. A. Blanchard, $\frac{5}{64}$; Scott Blanchard, $\frac{5}{64}$; P. B. Blanchard, $\frac{5}{64}$; James B. Parse, $\frac{3}{64}$.

8 II

By Public Act No. 23 of the 65th Congress, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, it was provided that:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized:

* * * * * * *

"(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production or purchase of ships or material.

* * * * * * *

"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction, or hereafter constructed, or any part thereof, or charter of such ship."

Said act also provides:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the Presi-
9 dent; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

* * * * * * *

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereinafter appropriated, through such agency or agencies as he shall determine from time to time."

* * * * * * *

"The word 'person' as used herein shall include any individual, trustee, firm, association, company, corporation, or contractor. The word 'ship' shall include any boat, vessel, or submarine and the parts thereof."

## III

Under authority of and pursuant to the provisions of said act of June 15, 1917, the President of the United States, on July 11, 1917, issued the following Executive order:

"By virtue of authority vested in me in the section entitled 'Emergency shipping fund' of an act of Congress entitled 'An act
10 making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved

June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

"WOODROW WILSON.

THE WHITE HOUSE, *11 July, 1917.*"

11

IV

On or about April 5, 1918, when said ship "Betsy Ross" was in the port of Melbourne, Australia, the said United States Shipping Board, or its duly authorized agents, on behalf of the Government, made use of, assumed, occupied, requisitioned, acquired, or took over said ship for use of the United States Grain Corporation (a Government agency organized, owned, and conducted by the United States, pursuant to the laws of Congress and Executive orders of the President) in the transportation of wheat from Australia to the United States, and said vessel was made use of, assumed, occupied, requisitioned, acquired, or taken over from the service and business of the plaintiffs by the officers and agents of the defendant.

The plaintiffs disbursed for the account of the defendants at their instance and request canal tolls at the Panama Canal, for the passage of said cargo of wheat, the sum of $2,185.60, no part of which has been returned to the plaintiffs, although duly demanded.

V

The compensation and reimbursement to which the plaintiffs are justly entitled by reason of being deprived of the use of said ship, as stated above, is the sum of $212,974.96, of which the plaintiffs had been paid only the sum of $63,784.00, leaving a balance due and owing to the plaintiffs of $148,290.96, with interest.

12

## VI

The petitioners further say that they have duly presented the above claim for adjustment by the President as provided in said act of Congress, but same has not been allowed or paid. No transfer or assignment of this claim has been made, and claimants are justly entitled to the amount herein claimed to be due, after allowing all just offsets and credits.

The claimants have at all times been loyal citizens of the United States, and have in no way voluntarily aided, abetted, or given encouragement to rebellion against the United States.

## VII

By reason of the premises there is now due and owing by the United States to the petitioners the said sum of $148,280.96, with interest.

Wherefore the petitioners pray judgment against the defendants for $148,280.96, with interest, and for such other and further relief in the premises as may be just.

AMOS D. CARVER.
S. E. TURNER.
CLIFFORD N. CARVER.
SCOTT BLANCHARD.
P. B. BLANCHARD.
JAMES B. PARSE.
A. N. BLANCHARD.
W. A. BLANCHARD.

13 [*Duly sworn to by Frank E. Scott; jurat omitted in printing.*]

14 III. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

IV. *Argument and submission.*

On October 26, 1926, this case was argued and submitted on merits by Mr. Frank E. Scott, for the plaintiffs, and by Mr. J. Frank Staley, for the defendant.

15 V. *Special findings of fact, conclusion of law, and opinion of the court by Hay, J.*

Filed January 17, 1927

This case having been heard by the Court of Claims upon the evidence and the report of the commissioner, the court makes the following

*Special findings of fact*

I

Plaintiffs are citizens of the United States and have at all times borne true allegiance to said Government and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States. Amos D. Carver, one of the plaintiffs, was during the transactions hereinafter described the managing owner of a certain ship, called the "Betsey Ross," and the ownership of said vessel during said time was vested in the plaintiffs in the following proportions:

Amos D. Carver, $\frac{1}{2}$; H. N. Blanchard, $\frac{12}{64}$; S. E. Turner, $\frac{12}{64}$; Clifford N. Carver, $\frac{14}{64}$; James B. Parse, $\frac{4}{64}$; W. A. Blanchard, $\frac{4}{64}$; Scott Blanchard, $\frac{4}{64}$; and P. B. Blanchard, $\frac{4}{64}$. Said vessel was a five-masted sailing ship classed as 100–A–1, by British Lloyds Registry, and was of the measurement of 2423 feet in length, 44.9 feet in width, and 19.7 feet in depth. Said vessel was built for plaintiffs by the Seaborn Shipbuilding Company at Tacoma, Washington, between the approximate dates of March 19, 1917, and October 8, 1917, at a cost to said plaintiffs of $176,000. Her net tonnage was 1,503, her gross tonnage 1,670, and her dead-weight cargo capacity was approximately 2,950 tons.

II

On August 30, 1917, plaintiffs entered into charter party with Messrs. J. J. Moore & Company, of San Francisco, California, for the transportation of a cargo of lumber from Chemainus, British Columbia, Dominion of Canada, to Melbourne, Australia, at the charter rate of $59 for each 1,000 feet, board measure. One of the conditions of said charter was as follows:

"This charter is subject to charter for return cargo being signed in New York, promptly after advice that this charter has been signed here."

Simultaneously with said lumber charter, plaintiffs entered into a charter party with the Mutual Chemical Company of America at New York which provided that said vessel on her return voyage should transport a cargo of chrome ore from the Island of New Caledonia (800 miles east of Australia) to New York or Baltimore, at the rate of $9.50 United States currency per ton of 2,240 pounds.

III

Under the provisions of the act of June 15, 1917, the President, by Executive order of July 11, 1917, delegated to the United States Shipping Board all power and authority vested in him by said act, which act included the power to cancel, suspend, or requisition any contract pertaining to the construction or operation of ships.

## IV

On November 26, 1917, about the time of the departure of said vessel upon her outward voyage, plaintiffs, through their agents, Messrs. D. B. Dearborn & Company, steamship brokers, New York City, applied to the United States Shipping Board for the approval of said voyage of the "Betsey Ross," and obtained said approval, as follows:

Address all communications to United States Shipping Board chartering committee, customhouse, New York

UNITED STATES SHIPPING BOARD CHARTERING COMMITTEE,
*New York, November 26, 1917.*

Messrs. D. B. DEARBORN & Co.,
*8 Bridge Street, N. Y.*

American schooner "Betsey Ross."

DEAR SIRS: We have your letter of November 26th in connection with charter of above vessel for a cargo of ore from New Caledonia to New York or Baltimore.

This charter is hereby approved.

Yours very truly,

(Sgd.) WILDING RING,
*Chairman of the Chartering Committee.*

## V

Thereupon said vessel proceeded on her voyage and prior to and during said outward voyage plaintiffs built "trunks" in said ship for the return cargo of chrome ore at a cost to plaintiffs of $5,889.35. Said lumber shipped for trunks for the carriage of chrome ore was used as dunnage for the carriage of a wheat cargo on her return voyage.

## VI

Said vessel completed her outward voyage, arriving in the port of Melbourne on March 9, 1918. Between March 9, 1918, and March 27, 1918, said ship was discharged of her cargo of lumber. Between March 27, 1918, and April 3, 1918, said vessel was cleaned and
17 painted, and on April 5, 1918, she was undocked and on April 10, 1918, she was ready to sail for New Caledonia. However, before she sailed the vessel's steering gear broke down, which occupied four days in her repairs.

## VII

On or about April 5, 1918, certain officials of the United States Shipping Board, and the United States War Industries Board, and of the British and Australian Governments, entered upon the dis-

cussion of requiring or requesting American-owned vessels, including the "Betsey Ross," to return to an American port with cargoes of wheat. There were differences of opinion between the said various officials as to what action should be taken, which discussion continued until May 9, 1918.

## VIII

The master of the "Betsey Ross" applied to the authorities at Melbourne, on April 5, 1918, for clearance papers. The commonwealth authorities declined to grant clearance, advising plaintiffs' agent at Melbourne that this action was taken at the request of the United States Shipping Board. On April 15th the plaintiffs' agent at Melbourne rendered bills to the Commonwealth Shipping Board for demurrage on the vessel due to the embargo placed against her, but these bills were disallowed and returned with the following letter on April 17th:

COMMONWEALTH OF AUSTRALIA,
COMMONWEALTH SHIPPING BOARD,
LIVERPOOL BUILDING, 135 WILLIAM STREET,
*Melbourne, 17th April, 1918.*

No. 5625. S. S. "Betsey Ross"

DEAR SIRS: Referring to your letter of the 15th inst., enclosing debit notes for demurrage in connection with above vessel; these are returned herewith, for, as previously advised, no responsibility can be accepted in regard to the matter.

I am instructed to inform you for the information of the master, that the following cable has been received from the Secretary of State, dated 15th April:

"With reference to your telegram of 12th April, American Shipping Board consider 'Betsey Ross' suitable wheat and requests she loads wheat not chrome ore."

Doubtless the master will receive instructions in regard to this vessel.

Yours faithfully,

(Sgd.) W. HEALE, *Secretary.*

MESSRS. WM. HAUGHTON & CO., *Melbourne.*

## IX

Pending the continuance of the said embargo the owners of the "Betsey Ross" made various efforts to have the vessel cleared
18 in order that she might carry out her chrome-ore charter, but action on these requests was delayed until May 9, 1918, pending a decision being reached by the United States Shipping Board that the vessel would be ordered to abandon her chrome-ore charter and return to the United States with a cargo of wheat. The

said vessel in the meantime remained idle at Melbourne pending these negotiations from April 10, 1918, to May 10, 1918, a period of 30 days, at the expense of the plaintiffs. The fair and reasonable value of the use of said vessel as of that time was $500 per day.

X

Shortly after plaintiffs were so notified by said Australian officials, and on or about May 15, 1918, the United States Food Administration Grain Corporation, at its office in New York, submitted to the managing owner of said vessel the so-called "Australian Government Form Wheat Charter," which was thereupon signed on behalf of plaintiffs and by said Grain Corporation.

Said charter contained the following provisions:

"New York, *May 15, 1918.*

"It is this day mutually agreed between Food Administration Grain Corporation, hereinafter called the charterers, of the one part, and Amos D. Carver for and on behalf of the owners of the good ship or vessel called the 'Betsey Ross,' classed 100 A-1, of the measurement of ..... tons net register, or thereabouts, and 2,750 tons deadweight cargo capacity 10% more or less, now Melbourne, whereof ..... is master, of the other part.

"That the said ship being tight, staunch, strong, and every way fitted for the intended voyage, shall load at Melbourne * * * a full and complete cargo of wheat and or flour in bags, which the said charterers bind themselves to provide, not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture, and being so loaded, shall forthwith proceed as ordered by charterers on signing bills of lading, to New York * * *.

"Freight being payable in sterling at and after at the rate of: (125.....) One hundred and twenty five shillings. All per ton of 2240 lbs. net weight, delivered, for wheat and or flour. Ninety per cent of the said freight to be paid on cable advice of having loaded and sailed, the balance, less advances, if any, to be paid on unloading and right delivery of the cargo, in cash at fixed rate of exchange of $4.76 per one pound sterling. Freight prepaid considered earned and not returnable ship and or cargo lost or not lost. * * *

"Ten (10) working days are to be allowed the said charterers or their agents (if the ship is not sooner dispatched) for loading the said ship at port of loading (Sundays and holidays excepted), to be reckoned from twenty-four hours after the master has given written notice to the charterers or their agents in business hours, that the ship is ready to receive cargo (the inward cargo or ballast then being all discharged and subject to clause 14), and the ship to be discharged with all dispatch as customary at the port of discharge.

The said charterers or their agents to have the option of keeping the said ship ten days on demurrage, at 1/— per net register ton per day for every day detained beyond the total number of lay days; such demurrage to be payable day by day when and where incurred. * * *

"It is also mutually agreed that this charter is subject to all the terms and provisions of and all the exemptions from liability contained in the act of Congress of the United States approved on the 13th day of February, 1893, and entitled an 'Act relating to navigation of vessels, etc.'"

At the time of or immediately prior to the signing of said wheat charter plaintiffs, as a result of their negotiations with the United States Food Administration, concluded that rather than have the United States Government take over the "Betsey Ross" said plaintiffs had better sign said wheat charter. This they did on May 15, 1918.

XI

The United States Food Administration paid plaintiffs for the transportation of said cargo of wheat $63,784, the same being upon the basis of the cargo of 2,144 tons at 125 shillings per ton and $4.76 per pound sterling as provided in said wheat charter. Said sum so paid did not include any sums as payments for disbursements or demurrage. The amount which plaintiffs would have earned under the terms of their ore charter of August 20, 1917, would have been $177,000.

XII

The "Betsey Ross" upon her return voyage arrived in New York about the time of the armistice, 1918. The claim herein sued upon was presented to the United States Shipping Board for an award of just compensation, and on or about February 17, 1920, said Shipping Board made an award disallowing said claim and any part thereof.

XIII

Just compensation to the plaintiffs for the cancellation of their contract with the Mutual Chemical Company of America is the sum of $113,216, with interest at the rate of 6 per cent per annum from May 9, 1918, until paid.

*Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of this judgment, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $113,216, with interest thereon at 6 per cent per annum from May 9, 1918, until paid.

It is, therefore, adjudged and ordered that the plaintiffs recover of and from the United States the sum of one hundred thirteen thousand, two hundred and sixteen dollars ($113,216), with interest thereon at 6 per cent per annum from May 9, 1918, until paid.

*Opinion*

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiffs against the United States to recover three items: $15,000, $5,889.35 and $113,216, making in the aggregate the sum of $134,105.35.

90 The plaintiffs, citizens of the United States, were at the times hereinafter mentioned the owners of a ship called the "Betsey Ross." On August 30, 1917, the plaintiffs entered into a charter party with J. J. Moore & Company, of San Francisco, for the transportation of a cargo of lumber from Chemainus, British Columbia, to Melbourne, Australia. One of the conditions of said charter party was as follows: "This charter is subject to charter for return cargo being signed in New York promptly after advice that this charter has been signed here."

Simultaneously with said lumber charter plaintiffs entered into a charter party with the Mutual Chemical Company of America at New York which provided that said ship on her return voyage should transport a cargo of chrome ore from the Island of New Caledonia, 800 miles east of Australia, to New York or Baltimore at the rate of $60 per ton of 2,240 pounds.

On November 26, 1917, about the time of the departure of said ship upon her outward voyage, the plaintiffs through their agents applied to the United States Shipping Board for the approval of the charter for the return voyage of said ship, and received approval as follows:

NEW YORK, *November 26, 1917.*

MESSRS. D. B. DEARBORN & CO.,
*8 Bridge Street, N. Y.*

American schooner "Betsey Ross."

DEAR SIRS: We have your letter of November 26th in connection with charter of above vessel for a cargo of ore from New Caledonia to New York or Baltimore.

This charter is hereby approved.

Yours very truly,

(Sgd.) WELDING RUSS,
*Chairman of the Chartering Committee.*

The "Betsey Ross" completed her outward voyage and arrived at the port of Melbourne on March 9, 1918. On April 10, 1918, the ship was ready to sail for New Caledonia to load her cargo of chrome ore.

On April 5, 1918, the United States Shipping Board, the United States War Industries Board, and the British and Australian Government entered upon a discussion as to the desirability of requiring American owned vessels in Australian ports to return to an American port with cargoes of wheat, but no decision was arrived at until May 9, 1918.

In the meantime the master of the "Betsey Ross" was refused clearance papers from the port of Melbourne upon the ground that the United States had requested that the "Betsey Ross" should

make her return voyage with a cargo of wheat instead of chrome ore, and it was not until May 9, 1918, that the master of the vessel was advised that he was required to load a cargo of wheat.

The plaintiffs were also notified, and their contract with the Mutual Chemical Company of America was rendered impossible of performance. On May 15, 1918, having had submitted to them by the United States Food Administration Grain Corporation the so-called "Australian Government form wheat charter," they signed said charter dated May 15, 1918. Under the provisions of said charter
21 plaintiffs were to be paid for the transportation of wheat at the rate of 125 shillings per ton of 2,240 pounds. The ship after clearing from Melbourne docked at William-town in the vicinity of Melbourne, and on May 29, 1918, the "Betsey Ross" sailed from Williamstown for New York with the cargo of wheat, 2,144 tons.

After the ship arrived at New York the plaintiffs were paid for the transportation of said cargo of wheat the sum of $63,784, the same being in full payment under the provisions of the contract.

Had the plaintiffs been permitted to perform their contract with the Mutual Chemical Company of America they would have earned the sum of $177,000.

The ship was idle 30 days in the port of Melbourne by reason of the fact that the United States Shipping Board requested that she be held until it could make up its mind whether the ship should make her return voyage loaded with wheat or chrome ore.

The claim which is sued upon here was presented to the United States Shipping Board for an award of just compensation, and on February 17, 1920, the said board made an award disallowing the claim.

The act of June 15, 1917, 40 Stat. 182, confers upon the President the power and authority to suspend and cancel contracts with respect to the operation of ships. The President delegated this power to the United States Shipping Board Emergency Fleet Corporation as he was authorized to do under the act. The act further provides that when contracts are suspended or canceled the United States shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by him is unsatisfactory to the person entitled to receive it such person shall be paid 75 per cent of the amount so determined, and shall be entitled to sue the United States to recover such further sum as added to said 75 per cent will make up such amount as will be just compensation therefor, and the act conferred upon this court jurisdiction to hear and determine such cases.

In the case at bar the plaintiffs made their claim for just compensation to the United States Shipping Board Emergency Fleet Corporation which board on February 17, 1920, disallowed the claim, whereupon the plaintiffs brought this suit.

The facts are that the United States Shipping Board suspended the contract of the plaintiffs for a period of 30 days while the said

board was deliberating the question whether the ship of the plaintiffs and all other American ships in the ports of Australia should or should not on their return voyage to the United States be loaded with cargoes of wheat; and the plaintiffs' ship by reason of these deliberations was forced to remain idle in the port of Melbourne, Australia, for the period of 30 days.

At the expiration of the said 30 days, on May 9, 1918, the plaintiffs were required by the United States Shipping Board Emergency Fleet Corporation to take on a cargo of wheat for its return voyage to the United States, and by this act the said board canceled the contract which the plaintiffs had with the Mutual Chemical Company of America to transport a cargo of chrome ore from the Island of New Caledonia to New York or Baltimore.

It is not denied that the contract under consideration is within the provisions of the act June 15, 1917, and that the power and
22 authority of the President in relation thereto was duly delegated to the United States Shipping Board Emergency Fleet Corporation.

The act provides for compensation in case the Government shall exercise the power conferred as to suspending and canceling contracts. Having the right to suspend and cancel the contract, it must be held that the Government must pay to the plaintiffs the just compensation for the loss which they incurred by reason of the suspension and cancellation of their contract. The United States Shipping Board having refused to pay to the plaintiffs any compensation, the case is before us, and we must determine the just compensation due to the plaintiffs from the evidence in the record, and in so determining that compensation we have endeavored to give to the plaintiffs the sum of money which they lost by reason of such suspension and cancellation, and to place them in as good a position pecuniarily as if the contract had not been suspended or canceled.

We have not allowed the item of $5,889.35, for the reason that the plaintiffs used the material in the transportation of the cargo of wheat, and it does not appear just what the plaintiffs lost by reason of the change made in the vessel. We can not base a judgment upon guess work. We have not allowed the item of $15,080 because, while the plaintiffs were delayed thirty days, yet they were relieved from performing their ore contract, and all the expenses incident thereto; and the plaintiffs being thus relieved can not claim the damages for delay and take advantage of the relief which they obtained by reason of not having to perform their contract to go to New Caledonia for the ore.

The Government took no evidence in this case, and the facts are undisputed.

We are of opinion that the plaintiffs are entitled to the sum set out in the conclusion of law, and judgment will be entered accordingly.

Moss, Judge; Booth, Judge; and Campbell, Chief Justice, concur. Graham, Judge, dissents.

23 VI. *History of further proceedings*

On March 14, 1927, the defendant filed a motion for additional findings of fact and for new trial.

On December 19, 1927, the court entered the following order on said motion:

VII. *Order overruling motion for new trial and entering amended judgment*

ORDER

It is ordered by the court this 19th day of December, 1927, that the defendant's motion for new trial and for additional findings be and the same is overruled.

It is further ordered that the conclusion of law be and the same is amended so as to read as follows:

"Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $113,216 with interest thereon at the rate of six per cent per annum from May 9, 1918, to date of judgment, amounting, principal and interest, to $178,503.89, together with interest on the principal sum of $113,216 at the rate of six per cent per annum from the date of judgment.

"It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of one hundred seventy-eight thousand, five hundred three dollars and eighty-nine cents ($178,503.89), together with interest at the rate of six per cent per annum on the principal sum of $113,216 from the date of judgment until paid."

The findings of fact otherwise and the opinion to stand.

24 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 33259. Court of Claims. Term No. 807. The United States, petitioner, vs. Amos D. Carver, S. E. Turner, Clifford N. Carver, et al. Petition for writ of certiorari and exhibit thereto. Filed February 25th, 1928. File No. 33259.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1928

## No. 78

THE UNITED STATES, PETITIONER

vs.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

*Order allowing certiorari*

Filed April 23, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# In the Supreme Court of the United States

OCTOBER, TERM, 1927

No. 807

THE UNITED STATES, PETITIONER

*v.*

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, et al.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

### OPINION BELOW

The opinion of the Court of Claims (R. 13) is not reported.

### JURISDICTION

The original judgment of the Court of Claims was entered January 17, 1927. (R. 7, 12.) Motion for new trial was seasonably filed and entertained and denied, and an amended judgment entered December 19, 1927. (R. 16.) Petition for certiorari was filed February 25, 1928. (R. 16.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## THE QUESTION PRESENTED

Respondents, owners of the ship *Betsy Ross*, had a charter party for carrying a cargo of ore from New Caledonia to the United States. The Shipping Board threatened to requisition the vessel unless the owners would carry wheat for the Food Administration. The owners, rather than have their vessel requisitioned, agreed to carry wheat and entered into a charter party with the Food Administration for a stipulated freight. The question here is whether there was a requisition of the vessel or of her use, or a modification or cancellation of a contract for the building, production, or purchase of ships or material within the meaning of the Act of June 15, 1917, so as to entitle the shipowners to just compensation under the Constitution.

## THE STATUTES INVOLVED

The Emergency Shipping Act of June 15, 1917 (c. 29, 40 Stat. 182), provides:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail

to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend

> the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Executive Order of July 11, 1917, No. 2664, is as follows:

> (Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the Emergency shipping legislation.)
>
> By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process

of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

## STATEMENT

The facts and assignments of error are sufficiently stated in the petition. (R. 1, 3.)

## ARGUMENT

There is little to be added to the statement in the petition for certiorari of the reasons for granting the writ.

The owners of the *Betsy Ross* had a charter with third parties for the carriage of ore from New Caledonia to the United States at a stipulated freight, which would have amounted to $177,000. While the vessel was in Australia and about to sail for New Caledonia to take on her cargo of ore, the United States Shipping Board, the United States War Industries Board, and the British and Australian governments entered upon a discussion as to the desirability of requiring American-owned vessels in Australian ports to return to an American port with cargoes of wheat. As the result, the *Betsy Ross* was temporarily refused clearance papers by the Australian Government from the port of Melbourne. The owners of the vessel were notified by the Shipping Board that unless they would return with a cargo of wheat the vessel would be requisitioned. Rather than have their vessel requisitioned, the owners yielded and not only agreed to bring home a cargo of wheat, but entered into a contract with the United States Food Administration Grain Corporation to carry the wheat for a stated freight, the amount of which aggregated $63,784.00, which has been paid.

The United States did not, in fact, requisition the vessel, nor requisition her use. Its threat to do so does not constitute legal duress. If the United States had insisted on the use of the ship for wheat, and the owners of the vessel had stood on their

rights and refused the proffered freight rate, compensation for the reasonable value of the use of the vessel might then have been obtained, and the proof of the freight which would have been earned under the ore charter would have been admissible to establish the value of the use. But when the owners yielded and agreed to the use of the vessel at a stipulated freight they failed to "save the question of price," as this Court said in *American Smelting and Refining Co.* v. *United States*, 259 U. S. 75, a decision which is controlling here. The United States did not requisition anything or take anything under the power of eminent domain.

The Court of Claims proceeded on the theory that the Shipping Board had suspended and then canceled the plaintiff's contract for carriage of ore, and that the case is therefore governed by subdivision (b) of the Act of June 15, 1917. It ignored the fact that the authority granted by that statute to modify, suspend, cancel, or requisition existing or future contracts related only to contracts "for the building, production, or purchase of ships or material." It is too plain for argument that the contract between the respondents and the owners of the ore for carriage of the ore to the United States was not a contract for the building, production, or purchase of ships or material. There is nothing in the Act of June 15, 1917, which authorized the cancellation of such a contract. The

Act did authorize the requisition of ships or their possession or use, but that power, although threatened here, was not exercised.

Subdivision (e) of the Act of June 15, 1917, authorized the requisition of any ship "or charter of such ship." The ore charter was not requisitioned. To accomplish that result within the meaning of subdivision (e), it would have been necessary for the Shipping Board to take over the charter from the owners of the ore and step into their shoes and perform the contract, by having the ship carry freight under it for the United States. That, of course, was not done. If it had been, the just compensation would have been payable to the owners of the ore, not to the shipowners. The United States did not even "frustrate" the ore charter, unless inducing one man to break his contract with another is frustration.

We are quite unable to see any legal basis whatever for the judgment of the Court of Claims. The United States has uniformly declined to recognize such a claim as this. If this judgment is sustained, claims of a similar character are likely to arise. The amount of the claim in this case totals, with interest, nearly $180,000. Although the case may not be of any vast importance, and the respondents may have equities in their favor, we do not feel justified in acquiescing in a judgment for such an amount, which appears to be without any legal basis to support it.

It is respectfully submitted that the writ of certiorari should be granted.

WILLIAM D. MITCHELL,
*Solicitor General.*

HERMAN J. GALLOWAY,
*Assistant Attorney General.*

J. FRANK STALEY,
*Attorney.*

MARCH, 1928.

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# In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 78

THE UNITED STATES, PETITIONER

*v.*

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER ET AL.

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 64 Ct. Cls. 1.

### JURISDICTION

The original judgment of the Court of Claims was entered January 17, 1927. (R. 7, 12.) Motion for new trial was seasonably filed and entertained and denied, and an amended judgment was entered December 19, 1927. (R. 16.) Petition for certiorari was filed February 25, 1928, and granted

April 23, 1928. (R. 16, 17.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

### THE QUESTION PRESENTED

Respondents, owners of the ship *Betsy Ross*, had a charter party for carrying a cargo of ore from New Caledonia to the United States. The Shipping Board threatened to requisition the vessel unless the owners would carry wheat for the Food Administration. The owners, rather than have their vessel requisitioned, agreed to carry wheat and entered into a charter party with the Food Administration for a stipulated freight, which was paid. The question here is whether there was a requisition of the vessel or of her use, or a modification or cancellation of a contract for the building, production, or purchase of ships or material within the meaning of the Act of June 15, 1917, so as to entitle the shipowners to just compensation under the Constitution.

### THE STATUTES INVOLVED

The Emergency Shipping Act of June 15, 1917 (c. 29, 40 Stat. 182), provides:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of

the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any

plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Executive Order of July 11, 1917, No. 2664, is as follows:

(Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the Emergency shipping legislation.)

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in further-

ance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

STATEMENT

The respondents, owners of the sailing vessel *Betsy Ross*, brought this suit in the Court of Claims alleging that the United States Shipping Board, as agent for the President, during April or May, 1918, requisitioned the use of that vessel,

then in the port of Melbourne, Australia, for carrying wheat to the United States, and they sought just compensation under the Constitution by reason of being deprived of the use of the ship. (R. 4–7.)

The findings show that on August 30, 1917, the respondents entered into a charter party for the transportation of lumber by the *Betsy Ross* from British Columbia to Melbourne. Simultaneously with the lumber charter the respondents entered into a charter party with the Mutual Chemical Company of America at New York, which provided that the vessel on her return voyage should transport a cargo of chrome ore from New Caledonia, which is about 800 miles east of Australia, to New York or Baltimore at a stipulated freight, which would have amounted to $177,000. (R. 8, 12.) Following administrative regulations, both charters had the approval of the United States Shipping Board.

The vessel proceeded on her voyage to Australia and arrived at Melbourne March 9, 1918, and between that date and March 27 the ship was discharged of her cargo. She was cleaned and painted, and on April 10, 1918, was ready to sail for New Caledonia to take on her cargo of ore. However, before she sailed her steering gear broke down, which occasioned four days in repairs. (R. 9, Finding VI.) The findings then state that—

> On or about April 5, 1918, certain officials of the United States Shipping Board, and the United States War Industries Board, and of the British and Australian Govern-

> ments, entered upon the discussion of requiring or requesting American-owned vessels, including the *Betsy Ross*, to return to an American port with cargoes of wheat. (R. 9, 10.)

This discussion continued until May 9, 1918. (R. 10.) The master of the *Betsy Ross* applied to the authorities at Melbourne on April 5, 1918, for clearance papers. The Australian authorities declined to grand clearance, advising the respondents' agent at Melbourne that this action was taken at the request of the United States Shipping Board. (R. 10, Finding VIII.)

The respondents' agent at Melbourne rendered bills to the Shipping Board of the Commonwealth of Australia for demurrage, but these bills were disallowed, and a letter from the Commonwealth Shipping Board to the agents of the *Betsy Ross* dated April 17, 1918, stated that a telegram had been received from the Secretary of State, dated April 15, as follows (R. 10):

> With reference to your telegram of 12th April, American Shipping Board consider *Betsy Ross* suitable wheat and requests she loads wheat not chrome ore.

The owners of the *Betsy Ross* made various efforts to have the vessel cleared from Melbourne, but action by the Commonwealth authorities on these requests was delayed until May 9, 1918, pending a decision being reached by the United States Shipping Board that the vessel would be ordered to

abandon her chrome-ore charter and return to the United States with a cargo of wheat. Pending these negotiations the vessel remained idle from April 10, 1918, to May 10, 1918, and the reasonable value of the use of the vessel for that period was $500 per day, or $15,000 in all. (R. 10, 11.)

On May 15, 1918, the owners of the vessel entered into a charter with the United States Food Administration Grain Corporation, at its office in New York, which provided that the *Betsy Ross* should load at Melbourne a cargo of wheat for New York. The charter stipulated that the freight should be at the rate of 125 shillings per ton, with the rate of exchange $4.76 per pound sterling. (R. 11.) The findings state (R. 12):

> At the time of or immediately prior to the signing of said wheat charter plaintiffs, as a result of their negotiations with the United States Food Administration, concluded that rather than have the United States Government take over the *Betsy Ross* said plaintiffs had better sign said wheat charter. This they did on May 15, 1918.

The vessel brought a cargo of wheat to New York and the stipulated freight, amounting to $63,784, was paid by the United States Food Administration and accepted by the owners of the vessel. The claim herein sued upon was then presented to the United States Shipping Board for an award of just compensation, and the claim was disallowed.

The Court of Claims found that "just compensation to the plaintiffs for the cancellation of their contract with the Mutual Chemical Company of America is the sum of $113,216." (R. 12.) That amount was the difference between $177,000, which the vessel would have earned under the terms of its ore charter, and the sum of $63,784, paid by the United States Food Administration as freight on the cargo of wheat. The Court of Claims held that the United States Shipping Board had cancelled the contract which the respondents had with the Mutual Chemical Company of America to transport ore, and awarded judgment to these respondents on that theory. It refused to make any allowance to the respondents for the value of the use of the vessel during the period of 30 days' delay at Melbourne.

SPECIFICATION OF ERROR

The Court of Claims erred in holding that the United States Shipping Board had authority to or had in fact suspended or cancelled the ore charter, and erred in holding that the vessel or her use had been taken so as to entitle the respondents to just compensation.

SUMMARY OF ARGUMENT

The United States did not in fact requisition the vessel, nor requisition her use. Rather than have that done the owners of the vessel preferred to make a contract at a stipulated freight to carry wheat. If the United States had insisted on the use of the

ship for wheat and the owners had stood on their rights and refused the proffered freight rate, compensation for the reasonable value of the use of the vessel might have been obtained, and the value of the use might have been measured by the amount which would have been earned under the ore charter, but when the owners yielded and agreed to the use of the vessel at a stipulated freight no requisition or taking occurred. The theory of the Court of Claims that the United States Shipping Board had suspended and then cancelled the respondents' contract for the carriage of ore overlooks the fact that subdivision (b) of the Act of June 15, 1917, authorized only the modification, suspension, cancellation, or requisitioning of contracts for the building, production, or purchase of ships or material, and the charter for carriage of ore was not such a contract.

**ARGUMENT**

The theory on which the Court of Claims granted judgment to the respondents was that the United States Shipping Board had cancelled the charter between the owners of the vessel and the Mutual Chemical Company for transportation of ore, and that such cancellation was within the authority granted by the Act of June 15, 1917. The court in its opinion said (R. 15):

> It is not denied that the contract under consideration is within the provisions of the act of June 15, 1917, and that the power and

> authority of the President in relation thereto was duly delegated to the United States Shipping Board Emergency Fleet Corporation.
>
> The act provides for compensation in case the Government shall exercise the power conferred as to suspending and canceling contracts. Having the right to suspend and cancel the contract, it must be held that the Government must pay to the plaintiffs the just compensation for the loss which they incurred by reason of the suspension and cancellation of their contract.

Subdivision (b) of the Act of June 15, 1917, authorized the President—

> To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

Clearly the charter party between the respondents and the Mutual Chemical Company for transportation of ore was not a contract for the building, production, or purchase of ships or material.

Subdivisions (c) and (d) admittedly have no application to this case. Subdivision (c) authorized the President "to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed * * * or charter of such ship." Under that subdivision the United States Shipping Board had authority to requisition the title to the ship or to requisition merely the use of the ship, or

to requisition the charter of the ship. If the United States had requisitioned the charter, it would have stepped into the shoes of the Mutual Chemical Company, and, by virtue of the charter party which it had taken over, would have required the vessel to transport a cargo of ore from New Caledonia to the United States. That, of course, was not done. (*Union Petroleum S. S. Co.* v *United States*, 18 F. (2d) 752.) If it had been, just compensation would have been payable to the owners of the ore, not to the ship owners. The latter would have received the freight stipulated in the ore charter.

The United States did not requisition the title to the vessel, nor did it requisition the use. It threatened to exercise the power of requisition, but the findings show that the respondents did not want their vessel requisitioned, and to avoid it made a contract to carry wheat at a stipulated freight. Having thus avoided a requisition, they now seek compensation as if requisition had been made.

The case is ruled by *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75. In that case an obligatory order was given which would have amounted to a requisition if the owners had stood on their rights, but, instead, they accepted the price offered and entered into a contract with the United States, and, as the Court said, failed to "save the question of price." That case also held that legal duress could not be found in such a transaction.

Here, the United States did not requisition anything or take anything under the power of eminent domain. The respondents entered into the wheat charter for the very purpose of preventing such action.

The case of *Meyer Scale & Hardware Co.* v. *United States*, 57 Ct. Cls. 26, relied upon by the respondents in their brief in opposition, is not in point. That case dealt with the cancellation by the United States of a contract which it had made for the purchase of equipment for use on Navy vessels, and the power was exercised pursuant to subdivision (b) of the Act of June 15, 1917, which authorized cancellation of contracts for purchase of ships or material. In this case if the United States had requisitioned the use of the vessel, thus preventing the owners from fulfilling their contract to transport ore, there would have been a liability to the owners of the vessel for the value of the use, of which the freight stipulated in the ore charter might have been a measure, but there would have been no cancellation of a contract for the building or production of ships or material, and the United States would not have been liable to the Mutual Chemical Company for interference with its charter. *Omnia Commercial Co., Inc.*, v. *United States*, 261 U. S. 502.

For the value of the use of the vessel for the period of thirty days during which she was delayed at Melbourne, the Court of Claims awarded no recovery, and the respondents did not seek to review

that action in this Court, and there are no findings which would support a judgment against the United States for the value of the use during that period for delaying. The refusal to grant clearance was the act of the Australian Government.

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*
HERMAN J. GALLOWAY,
*Assistant Attorney General.*
J. FRANK STALEY,
*Attorney.*

NOVEMBER, 1928.

○

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CHARLES ELMORE CROPLEY
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No. 807.

IN THE

# Supreme Court of the United States

October Term, 1927.

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THE UNITED STATES,

*Petitioners,*

*vs.*

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT BLANCHARD, P. B. BLANCHARD, JAMES B. PARSE, A. N. BLANCHARD, W. A. BLANCHARD.

*Respondents.*

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*On Petition for a Writ of Certiorari to the Court of Claims.*

## Brief For The Respondents In Opposition.

THE REPORTER CO., WALTON, N. Y.
New York Office: 256 Broadway, Room 512. Phone 6075 Barclay.
1928

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IN THE

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October Term, 1927,

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*On Petition for a Writ of Certiorari to the Court of Claims.*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION.

### Opinion Below.

The opinion of the Court of Claims (R., 13) is not yet reported.

### Jurisdiction.

The original judgment of the Court of Claims was entered January 17, 1927 (R., 7). On March 14, 1927, defendants' counsel filed a motion for a new trial (R., 16). On December 19, 1927, said motion was overruled, and the Court entered an order modifying the judgment (R., 16). The petition for certiorari was filed February 25, 1928 (R., 16). The jurisdiction of this Court is provided by Section 3 (b) of the Act of February 13, 1925.

## Concerning the Petition.

The two "Assignments of Error," stated in the petition (R., 3), are not specific but rather general, and the petition concludes with this sentence: "Although the case may be of no general importance, we do not feel justified in acquiescing in a judgment for that amount, which appears to be without anything to support it." This statement indicates that the Government's counsel have not had the opportunity to consider this case with the care the Court took with it. In any event, the petition does not properly reveal the reasons which actuated the Court of Claims in reaching its judgment. However, in the consideration of proposed findings, and the argument and a long motion for a new trial, the Court of Claims had this case under consideration for more than a year, and that Court had a good reason for the action it took, which we will endeavor respectfully to explain.

## The Question Presented.

The question is, whether the Emergency Shipping Fund provisions of the Act of June 15, 1917 (c. 29, 40 Stat. 182), authorized the Court of Claims to render judgment in favor of plaintiffs for just compensation, on account of the Shipping Board assuming possession and control of plaintiff's ship, and ordering the cancellation of the ship's charter, under the circumstances presently to be stated—immediately following the presentation of the Statute involved.

## The Statute Involved.

The provisions of the Act just mentioned are as follows *(see footnote):

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized:
>
> "(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> "(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.
>
> "(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.
>
> "(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

---

* The authority herein conferred upon the President was delegated to the Shipping Board under Executive Order of July 11, 1917, No. 2604 (R. S. 6).

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated

through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct."

**Statement of the Case.**

Between March 19, 1917, and October 8, 1917, the plaintiffs expended the necessary money for the construction of a schooner called the "Betsey Ross." Before the vessel was completed (by a shipyard at Tacoma, Washington), the plaintiffs entered into a charter on August 30, 1917, with the Mutual Chemical Company of America, to transport to New York on this ship, a cargo of chrome ore from New Caledonia (some 800 miles northeast of Melbourne, Australia). Simultaneously with this charter, the plaintiffs entered into a conditional charter with Messrs. J. J. Moore and Company of San Francisco for the outward voyage, to take a cargo of lumber from Chemainus, British Columbia, to Melbourne (R., 8). Before undertaking this voyage which was so hazardous at that time, the plaintiffs desired the assurance of the Shipping Board, that they, the plaintiffs, would be permitted to carry out their charter to bring back the ore. Accordingly, before the ship sailed from Puget Sound, the plaintiffs applied to the Shipping Board for, and received, their written approval for carrying out this ore charter (R., 9). Thereafter the vessel took aboard sufficient lumber, and other supplies, to enable her crew to build trunks in, and otherwise condition, the ship for the transportation of the ore. A

part of this work was done during the outward voyage to Melbourne, and the material for thus equipping the ship cost the plaintiffs $5,889.35.

The vessel arrived in Melbourne March 9, 1918, was unloaded, conditioned, and ready to sail for New Caledonia on April 10, 1918. However, when the master applied a few days prior thereto for his clearance papers, he was told that his clearance was refused at the request of the United States Shipping Board (R., 3). It had developed that prior to April 5, 1918, certain officials of the Shipping Board and U. S. War Industries Board and of the British and Australian governments had entered upon discussions as to requiring the "Betsey Ross," and some other vessels, to return to an American port with a cargo of wheat. There were differences of opinion as to what action should be taken, and these negotiations continued until May 9, 1918. Accordingly, the Australian authorities continued to decline to grant clearance to the master of the "Betsey Ross," advising him from time to time that they were acting under the directions of the United States Shipping Board. On May 9, 1918, the plaintiffs were advised that the vessel was ordered by the United States Shipping Board to abandon her chrome ore charter, and that she would not receive her clearance from Melbourne unless she be loaded with wheat. Thus, the vessel's owners were left by the Shipping Board under the handicap described, and the consequent necessity of accepting the best terms which might be offered to them for a return cargo of wheat. But no terms were ever offered by the Shipping Board, or any other person or persons acting on behalf of the United States (*infra*, 15).

Pending the above, the vessel remained idle at Mel

bourne during the period of 30 days between April 10 and May 9, 1918, at the expense of the plaintiffs (R., 4). The fair and reasonable value of the vessel at that time was $500 per day (R., 4).

Shortly thereafter, on May 15, 1918, the plaintiffs, having the opportunity, accepted an offer of the Food Administration Grain Corporation, a commercial corporation, organized under the laws of Delaware (*infra*, p. 15), for the "Betsey Ross" to return to the United States with wheat (R., 4). The Food Administration Grain Corporation paid the plaintiffs for the transportation of said cargo of wheat $63,784.

The amount which the plaintiffs would have earned if they had been permitted to carry out their chrome ore charter would have been $177,000. The contract so provided.

The plaintiffs filed a petition for just compensation in the Court of Claims, under the provisions of the said Emergency Shipping Act, claiming the foregoing three items of loss, namely, (a) the $5,889.35 for the cost of building the ore trunks and otherwise conditioning the "Betsey Ross" for carrying the chrome ore; (b) $15,000 for the value of the said ship during the period of detention between April 10 and May 9, 1918, while she was held at Melbourne under orders of the Shipping Board; and (c) $113,216, the difference between what plaintiffs would have earned under the chrome ore charter, $177,000, and what they were paid by the Food Administration Grain Corporation, $63,784.

The Court of Claims entered judgment for the plaintiffs for the third item only, $113,216 with interest, and disallowed the first and second items on the ground that the plaintiffs were relieved from performing the chrome ore charter, and hence were not entitled to claim the other two items of their loss (R., 15).

REASONS WHY THE PETITION HEREIN SHOULD BE DENIED.

It is respectfully claimed by respondents that the petition herein should be denied for the following reasons:

## I.

**This appears to be the kind of case which was intended to be excluded from review on appeal by Paragraph 6 of Rule 38 of this court, because:**

(1) The Emergency Shipping Fund provisions of the Act under consideration were repealed by Section 2, Chapter 250, of the Merchants Marine Act of June 5, 1920 (41 Stat. 988), and hence the question presented is not a live one in the sense that it involves the application of an existing statute.

(2) By reason of the six-year statute of limitations, no further suits similar to the one at bar may be commenced (*Jud. Code*, §156; 36 Stat. 1139), and furthermore there are no similar claims now in litigation (R., 3).

(3) The decision of the Court of Claims is entirely consistent with its interpretation of the statute involved, in other cases, particularly *Meyer Scale & Hardware Co. v. United States* (57 Ct. Cls. 261, which will be mentioned further below (*infra*, p. 16).

## II.

**The judgment of the Court of Claims is right in principle. The action taken by the Shipping Board was authorized by the statute which provided for just compensation.**

We respectfully submit the Court of Claims was right for the following reasons:

(1) First, the action of the Shipping Board in holding the plaintiffs' ship in Melbourne for upwards of a month, and in directing the Australian authorities to refuse clearance to the ship, and ordering the cancellation of her charter, was an "order" for a ship within the meaning of Subsection "(a)" of the statute. The Government's counsel do not mention the application of this subsection, but by implication seem to say that it refers only to orders for the *construction* of a ship. However, the words of Subsection "(a)," "*to place an order* with any person *for such ships* • • • which are of the nature, kind and quantity usually produced or capable of being produced by such person," are not the words which would be employed to mean only an order for the *building* or *construction* of a ship. The word *build* and the word *construct* are so customarily employed in connection with ships that it is reasonable to suppose that one of these words would be used when its generally accepted meaning alone was intended. On the other hand, the word "produce" is a more comprehensive term, and in its usual sense applies to the act of supplying or making available for use a completed ship. Referring to a dictionary on the authority of *Nix v. Hedden* (149 U. S. 304), there will be found among other synonyms of the word *produce*, the words *supply* and *furnish*. Accordingly, the per-

sons intended to be included in this Subsection "(a)" of the act as capable of "producing" a ship, were not only those who could *build* but also those who could furnish or otherwise make available a ship for use.

(2) The foregoing interpretation is consistent with the next succeeding Subsection "(b)" of the statute, which expressly indicates a distinction between "building" and "production." And all doubt about the matter would seem to be removed by the wording of the paragraph immediately following Subsection "(c)," where it is shown that the "orders" referred to were intended to include the requirement "to *build, supply, furnish* or *manufacture*" as follows:

> "Compliance with all orders issued hereunder shall be obligatory on any person to whom such *order* is given, and such *order* shall take precedence over all other *orders and contracts* placed with such person. *If any person owning any ship, charter or material* * * * shall refuse or fail to comply therewith, or to give to the United States such preference in the execution of such order, *or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered*, at such reasonable prices as shall be determined by the President, the President may take immediate possession, etc."

Accordingly, when the Shipping Board assumed control of the plaintiffs' ship, and ordered the suspension and cancellation of her ore charter, it was reasonably within the exercise of the authority conferred by Subsection "(b)" "to modify, *suspend, cancel* or requisition any existing or future contract for the building, *production*, or purchase of ships or material."

The Government's counsel cannot reasonably deny, though they do not admit, that Congress intended by the foregoing to provide that just compensation should be made for the suspension and cancellation of a contract for the "building" of a ship, but they contend in any event that Congress did not intend to accord the owner of a contract for the use of a completed ship, a like treatment. But in this, it appears that the Government's counsel are not supported by the debates in Congress concerning the provisions of the act at the time it was up for passage. These debates show it was the purpose of Congress to give to the Shipping Board, through the President, a sovereign power to do with ships, or ships under construction, *or contracts affecting either*, anything thought necessary for governmental purposes. There is no intimation that the owners of contracts for ships under construction were to be favored over the others.

The following remarks of the Chairman of the Appropriations Committee of the House is indicative of the unlimited scope of the act, and it will be noted that in his statements about the *suspension* and *cancellation* of private contracts, there is no suggestion that these terms were intended to apply only to contracts for ships in process of construction:

> "The proposed amendment which the House is asked to adopt is simply the rearranging the Senate amendment in more logical form and differs from it in four principal respects: First, it gives power to *suspend* contracts as well as to cancel, modify or requisition. In the Senate provision there was no authority to *suspend a contract between private parties*, which might interfere with the Government requisitioning *or requiring work to be done*."

* * * * *

> "This legislation is of a very radical, unique, and unusual character. It confers the most comprehensive powers *ever proposed* upon the President of the United States. It authorizes him to requisition the entire output of a factory, to take over ships, *to cancel contracts*, to assume contracts, *to suspend contracts*, to operate those ships, * * *" (Cong. Rec., Vol. 55, Part 3, p. 3015).

If the narrow interpretation sought to be placed on this statute by the Government's counsel were the correct one, this legislation would not be extraordinary at all—it would not be the slightest enlargement upon the 5th Amendment to the Constitution in respect of the obligation to make just compensation for the "taking" of private property.

Accordingly, if what has been said is so, it follows that the plaintiffs would be entitled to just compensation for their losses on account of the authority so exercised by the Shipping Board, under the final paragraph of the act which states:

> "Whenever the United States shall *cancel*, modify, *suspend*, or requisition *any* contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, * * *."

(3) Notwithstanding the foregoing, the further ground upon which the plaintiffs stand in respect of the authority conferred upon, and exercised by, the Shipping Board, is to be found in Subsection "(e)" of the Act. By this subsection the Shipping Board was authorized to *take* either the plaintiffs' ship or the "charter of such ship." The application of this subsection to the item of the claim for the value of the ship while she was held at Melbourne at the plaintiffs' expense

is self-evident. Certainly as to this item of loss, the Court of Claims had jurisdiction under Subsection "(c)" of the Statute, because private property, or the possession of it, may not be taken without compensation. This was not disputed in the Court of Claims. In fact, as the Court of Claims states in its opinion, the application of this statute to the whole claim was not disputed in the argument of the case before that Court (R., 15). The principal argument of the Government's counsel was that there was nothing due the plaintiffs on account of the Shipping Board retracting from its agreement and cancelling the ship's charter. Thus, while the Shipping Board admitted the retention of the ship and the order for the cancellation of her charter, they said that they did not *take* anything from plaintiffs, and therefore, to use the Board's own words, the plaintiffs' losses "were *damnum absque injuria.*" The plaintiffs' answer to this is the contention respectfully made that no cases are reported which better justify the application of the rule that a destruction of property may amount to a *taking* (*Duckett v. United States*, 266 U. S. 149, 151). The predicament of the plaintiffs, who were shipping merchants, in respect of the loss of their contract, is reminded of the statement in "The Merchant of Venice" (Act IV): "You *take my house*, when you do *take the prop* that does sustain my house."

(4) But there is another view of the application of this Subsection "(c)" which seems equally decisive of the merits of this controversy. The Shipping Board was clearly authorized by this law to take the ship's charter, that is, consistent with their own agreement already made with the plaintiffs, they were authorized to say to the plaintiffs, "We will pay you the same amount to bring back wheat in your ship, which she is to receive for bringing back the ore." But the Ship-

ping Board, instead of this, treated the plaintiffs in a most inequitable manner. They held the ship in Melbourne for thirty odd days, and then ordering the cancellation of her charter, left the plaintiffs in that distant port to meet their difficulties as best they might. In doing this the Shipping Board retracted from—we may say repudiated, its own written agreement with the plaintiffs that the ore charter might be carried out. Accordingly, the plaintiffs contend that what was clearly the Shipping Board's duty to the plaintiffs may be regarded, in a court of equity, as having been done, "upon the known principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done" (*Taylor v. Longworth*, 14 Peters 172, 177). It may be noted that what the Court of Claims did was to allow the plaintiffs only the difference between the ore charter and what they were to receive for bringing back the wheat, eliminating all other items, so the Government cannot claim, and does not claim any inequity. The plaintiffs were entitled to this, and the Shipping Board, in honor of their own agreement, ought to have assumed this obligation then and there, as Congress authorized and intended they should do.

**Concerning Authorities Cited in Petition.**

Some authorities are cited in the Petition (R., 3), but we respectfully say that the rules laid down in these cases have no place for application in the case at hand, for reasons which will be briefly stated.

In the case of *Omnia Company v. United States* (261 U. S. 503), a claimant was denied compensation for the frustration of a contract which gave claimant the opportunity to purchase a large quantity of steel from a steel plant. The damages claimed were held to

be too remote under the circumstances that claimant had made no payments under the contract, and the United States had not had any direct dealings with claimant or its property. But the circumstances of the case at bar are essentially different. The Shipping Board held plaintiff's ship in Melbourne for a considerable period and ordered her charter to be cancelled in violation of an agreement, which plaintiffs had relied upon, and incurred heavy expenses in carrying out for more than five months.

In the case of *Berg v. United States* (269 U. S. 535), which is cited in the petition, there is no opinion by the Court.

The only possible application of the case of *American Smelting and Refining Company v. United States* (259 U. S. 75), relates to the question of duress. In pressing this point the Government's counsel contend that the Shipping Board was relieved from any obligations to plaintiffs, because the plaintiffs made an agreement with the Food Administration Grain Corporation to bring back wheat. But, in this the Government's counsel fail to take into consideration an important fact, as the Court of Claims correctly viewed it, namely, that no terms were offered by the Shipping Board, and there was nothing else the plaintiff could do, unless indeed it was to sit around with their ship indefinitely in foreign waters. The Grain Corporation was a commercial corporation organized under the laws of Delaware* (footnote), and it had no identity in fact or law with the Shipping Board, and in a legal sense it had no identity with the United States (*Bank of Georgia v. United States*, 22 U. S. 333), although

* The "Food Administration Grain Corporation" was organized under the laws of Delaware pursuant to Executive Order No. 2681 (August 14, 1917), under the provisions of the Food Control Act of August 10, 1917 (40 Stats., 279).

the United States owned the stock of the corporation. The Shipping Board was not a party to the agreement between plaintiffs and the Grain Corporation, and had nothing whatever to do with it. Accordingly, the plaintiffs had a right to take such hire as was offered by a third party without relinquishing their right to claim their immediate and direct losses occasioned by the Shipping Board's interventions. The rule in *American Smelting and Refining Company* case has no place for application because neither the Shipping Board nor any agent of the United States had any dealings with the plaintiffs here after the ore charter was ordered to be cancelled. The Board issued orders to the Australian authorities not to clear the ship unless she be loaded with wheat, and under that handicap left the plaintiffs to shift for themselves. Hence the situation in which the plaintiffs were placed is the same in principle as one in which a party is required to mitigate damages.

The decisions in *Friend v. United States* (56 Ct. Cls., 423), and *Union Petroleum Co. v. United States* (18 F. [2d] 752), have to do with facts quite similar to those in the *Omaha* case, and accordingly, the claims in those cases were held to be too remote.

## Conclusion.

The judgment of the Court of Claims is consistent with the decision of that Court in one of the first cases which came before it involving an interpretation of the Act in question, namely, *Meyer Scale and Hardware Co. v. United States* (57 Ct. Cls. 26). While the facts in the *Meyer Scale* case are not similar to those under consideration, the Court of Claims in that case went exhaustively into the legislative history of the Act, stating that this was done in anticipation of other cases

to arise, requiring the application of the Statute. The Court's opinion in the *Meyer* case is consistent with its decision here; and in answer to the same arguments for the narrow construction contended for in the case at hand, the Court said:

> "The words *'modify,' 'suspend,' 'cancel'* and *'requisition' are each of plain, well-understood meaning and each has its proper function in the accomplishment of the intended purpose. Combined, they covered the whole field of necessary operations so far as contracts were concerned, to the end that they might be found necessary to the accomplishment of governmental purposes.*
> • • •
>
> "The Act in question provided for compensation in case the Government should exercise powers conferred as to *cancelling, modifying, suspending* or *requisitioning contracts*, taking over plants, etc., *and the measure* is *'just compensation.'*"

A somewhat similar act of Parliament has been construed to cover the losses from the cancellation of a contract, in a case wherein the claimant did not have the equities in its favor which exist in behalf of the plaintiffs here (*Elliott Steam Tug Co. v. The Shipping Comptroller* (1922), 1 K. B. 127).

The judgment of the Court of Claims is founded upon the principle that the plaintiffs are entitled to be placed in the position they would have been in if the Shipping Board had kept its agreement and not cancelled the ore charter. The judgment does not place the plaintiffs in this position by a wide margin, because they were allowed nothing for the expropriation of their ship in Melbourne, and other items of expense attributable directly to the Shipping Board's actions. However, the judgment is right in principle, and clearly the Government has no basis to complain of an in-

equity. The Shipping Board may have only intended to render an accommodation to the Grain Corporation, but they had no right to do this at the plaintiffs' expense. If they wanted this ship to bring back wheat, they should have paid what the services were worth, instead of cancelling the plaintiffs' charter and leaving them helpless. An implied promise arose under the circumstances irrespective of the Shipping Board's retraction from its own agreement.

For the reasons stated, it is respectfully asked that the petition be denied.

Respectfully,

FRANK E. SCOTT,
Attorney for Respondents.

The Munsey Building,
Washington, D. C., April, 1928.

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No. 78.

IN THE

# Supreme Court of the United States

October Term, 1928.

THE UNITED STATES,

*Petitioners,*

*vs.*

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT BLANCHARD, P. B. BLANCHARD, JAMES B. PARSE, A. N. BLANCHARD, W. A. BLANCHARD,

*Respondents.*

*On Writ of Certiorari to the Court of Claims.*

## Brief For The Respondents.

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In the

**SUPREME COURT OF THE UNITED STATES**

October Term, 1928,

No. 78.

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The United States,
Petitioners,
vs.
Amos D. Carver, S. E. Turner, Clifford N. Carver, Scott Blanchard, P. B. Blanchard, James B. Parse, A. N. Blanchard, W. A. Blanchard.

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*On Writ of Certiorari to the Court of Claims.*

## BRIEF FOR THE RESPONDENTS.

### Opinion Below.

The opinion of the Court of Claims (R., 13) is reported in 64 Ct. Cl. 1.

### Jurisdiction.

The original judgment of the Court of Claims was entered January 17, 1927 (R., 7). On March 14, 1927, defendants' counsel filed a motion for a new trial (R., 16). On December 19, 1927, said motion was overruled, but the Court entered an order modifying the judgment (R., 16). The petition for certiorari was filed February 25, 1928 (R., 16) and granted April 13, 1928 (R., 17). The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925.

## The Questions Presented.

Respondents, owners of the ship *Betsy Ross*, chartered this vessel in August, 1917, to proceed from Seattle, Washington, to New Caledonia, and to transport therefrom to New York a cargo of chrome ore. Before the ship sailed from Seattle, the Shipping Board was requested to approve the charter, and this was done in writing. After the ship had undertaken the voyage, and had proceeded as far as Melbourne, Australia, the Shipping Board, in violation of its approval of the ore charter, directed that the ship be held in Melbourne for more than a month, and then ordered the cancellation of the ore charter, requesting the Australian authorities not to clear the ship unless she be loaded with wheat for the United States. However, no charter to carry wheat was offered by the Shipping Board, or any agent representing the Board. Respondents on their own responsibility and in mitigation of damages, obtained a cargo of wheat from the *Food Administration Grain Corporation* (a Delaware corporation) and received as freight about one third the amount they were to receive for transporting the ore, and suffered a loss, by reason of the cancellation of their ore charter, of $113,216, for which amount a judgment was rendered by the Court of Claims.

The questions presented are:

(1) Whether this *destruction* of respondents' contract constituted a "taking" of their property, entitling the respondents to just compensation under paragraph "(e)," (and the next succeeding two paragraphs), of the Emergency Shipping Fund provisions of the Shipping Act of June 15, 1917, and/or,

(2) Whether the respondents are entitled to just compensation under paragraphs "(a)," and "(b)" (and the two paragraphs immediately following paragraph "(e)"), of said Act, by reason of the "suspension" and "cancellation" of their ore contract—even if paragraph "(e)" did not apply. *(Footnote.)

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*The introductory statements appearing in the Government's brief under the caption, "The Question Presented" (p. 2), are to the effect that respondents made an agreement with the Shipping Board to bring back the cargo of wheat from Australia, and thereby relinquished to the Shipping Board the claim for the destruction of the ore charter. Thus the judgment of the Court of Claims in this case is made to appear absurd, because, if this were so, the ruling in *American Smelting and Refining Company v. United States*, (55 Ct. Cl. 466, affirmed 259 U. S. 75) would clearly apply. However, the above question of fact was urged at great length in the case at bar before the same five judges of the Court of Claims, who had previously decided the *American Smelting and Refining Company* case. The Court concluded that no such agreement was ever made by respondents with the Shipping Board, and that the *American Smelting and Refining Company* case which was strongly urged upon the Court had no place for application. We therefore respectfully ask that the conclusion of the Court of Claims on this question of fact be regarded as final.

## The Statute Involved.

The provisions of the Act just mentioned are as follows *(see footnote):

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized:
>
> "(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> "(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.
>
> "(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract

*The authority herein conferred upon the President was delegated to the Shipping Board under Executive Order of July 11, 1917, No. 2664 (R., 5, 6).

or agreement with the owner or occupier of such plant.

"(c) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof, without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so de-

termined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct."

## Statement of the Case.

Between March 19, 1917, and October 8, 1917, the respondents expended the necessary money for the construction of a schooner called the "Betsey Ross." Before the vessel was completed (by a shipyard at Tacoma, Washington), the respondents entered into a charter on August 30, 1917, with the Mutual Chemical Company of America, to transport to New York on this ship, a cargo of chrome ore from New Caledonia (some 800 miles northeast of Mel-

bourne, Australia). At the same time and as a condition of this charter, the respondents entered into a charter with Messrs. J. J. Moore and Company of San Francisco for the outward voyage, to take a partial cargo of lumber from Chemainus, British Columbia, to Melbourne (R., 8). Before undertaking this voyage, so hazardous at that time, the respondents desired the assurance of the Shipping Board, that they, the respondents, would be permitted to carry out their charter to bring back the ore. Accordingly, before the ship sailed from Puget Sound, the respondents applied to the Shipping Board for, and received, their written approval for carrying out this ore charter (R., 9). Thereafter the vessel took aboard sufficient lumber, and other supplies, to enable her crew to build trunks in, and otherwise condition, the ship for the transportation of the ore. A part of this work was done during the outward voyage to Melbourne, and the material for thus especially equipping the ship for transporting the ore, cost the respondents $5,889.35.

The vessel arrived in Melbourne March 9, 1918, was conditioned, and made ready to sail for New Caledonia on April 10, 1918. However, when the master applied a few days prior thereto for his clearance papers "the commonwealth authorities declined to grant clearance, advising plaintiffs' agent at Melbourne that this action was taken at the request of the United States Shipping Board" (R. 10, Finding VIII). It had developed that prior to April 5, 1918, certain officials of the Shipping Board and U. S. War Industries Board and of the British and Australian governments had entered upon discus-

sions as to directing that the "Betsey Ross" should return to an American port with a cargo of wheat. There were differences of opinion as to what action should be taken, and these negotiations continued until May 9, 1918 (R. 10, F. VII). Accordingly, the Australian authorities continued to decline to grant clearance to the master of the "Betsey Ross," advising him from time to time that they were acting under the directions of the United States Shipping Board. On May 9, 1918, the respondents were advised that the vessel was ordered by the United States Shipping Board to abandon her chrome ore charter, and that she would not receive her clearance from Melbourne unless she be loaded with wheat. Thus, the vessel's owners were left by the Shipping Board under the handicap described, and the consequent necessity of accepting the best terms which might be offered to them for a return cargo of wheat. But no terms were ever offered by the Shipping Board, or any other person or persons acting as agent for, on behalf of, the Shipping Board or the United States (*infra*, 19).

Pending the above, the vessel remained idle at Melbourne during the period of 30 days between April 10 and May 9, 1918, at the expense of the respondents (R., 4). The fair and reasonable value of the vessel at that time was $500 per day or $15,000.00 for the period of her detention (R., 4).

Shortly thereafter, on May 15, 1918, the respondents having the opportunity, accepted an offer of the Food Administration Grain Corporation, a commercial corporation, organized under the laws of Delaware (*infra*, p. 19), for the

"Betsey Ross" to return to the United States with wheat (R., 4). The Grain Corporation paid the respondents for the transportation of said cargo of wheat $63,784.

The amount which the respondents would have earned if they had been permitted to carry out their chrome ore charter would have been $177,000. The contract so provided (R., 12, F. IX).

The respondents filed a petition for just compensation in the Court of Claims, under the provisions of the said Emergency Shipping Act, claiming the foregoing three items of loss, namely (a) the $5,889.35 for the cost of building the ore trunks and otherwise conditioning the "Betsey Ross" for carrying the chrome ore; (b) $15,000 for the value of the said ship during the period of detention between April 10 and May 9, 1918, while she was held at Melbourne under orders of the Shipping Board pending the decision that the ore charter must be cancelled and (c) $113,216 the value of the ore charter, measured by the difference between what respondents would have earned under the ore charter, $177,000, and what they were paid by the Grain Corporation, $63,784, for transporting wheat.

The Court of Claims entered judgment for the respondents for the third item only, $113,216 with interest, and disallowed the first and second items on the ground that the respondents were relieved from performing the chrome ore charter, and hence were not entitled to claim the other two items of their loss (R., 15).

## ARGUMENT.

### POINT I.

**There was a destruction by the Shipping Board of respondents' ore contract, which amounted to a "taking," and Section "(e)" and the two following paragraphs of the act, apply.**

The ground on which the respondents principally rely in respect of the authority conferred upon, and exercised by, the Shipping Board, is found in subsection "(e)," (and the two following paragraphs) of the Act. By this subsection the Shipping Board was authorized to *take* either the respondents' ship, or "the charter of such ship." The application of this subsection to the item of the claim for the value of the ship while she was held in Melbourne for more than a month at respondents' expense is clear. Certainly, as to this item of loss, the Court of Claims had jurisdiction under subsection "(e)" and the two following paragraphs, because the general law is therein expressly recognized, namely, that private property or the possession of it may not be taken without compensation. (The Constitution, 5th Amendment. See also, *De Keyser's Hotel Ltd. vs. The King*, 88 L. J. Ch. (1919), 415). This was not disputed in the Court of Claims as that Court points out in its opinion (R., p. 15). The principle argument of Government's counsel in the Court below rested almost entirely upon a technical discussion as to what would constitute a "taking." Thus, while the Shipping Board and Government's counsel admitted the retention of respondents' ship, and

the order for the cancellation of her charter, they argued that they did not thereby *take* anything from respondents. In reply to this the respondents respectfully contend that no cases are reported which better justify the application of the rule that a destruction of property may amount to a "taking." "A right may be taken by simple destruction for public use." (*Duckett vs. United States*, 266 U. S. 149, 151; *United States vs. Welch*, 217 U. S. 338). "You *take my house*, when you do *take the prop* that does sustain my house" (*The Merchant of Venice*, Act IV).

But there is another view of the application of this subsection "(e)" which seems also decisive of the merits of this controversy. The Shipping Board was clearly authorized by this subsection to take the ship's charter, that is, consistent with their own agreement already made with the respondents, they were authorized to say to the respondents: "We will pay you the same amount to bring back wheat in your ship, which she is to receive for bringing back the ore." But the Shipping Board, instead of this treated the respondents in a most inequitable manner. They offered no help whatever to provide the ship with a cargo of wheat. The Director of Operations of the Shipping Board at that time, Mr. E. F. Carry, who is now president of the Pullman Company, and under whose authority the ore charter was cancelled, testified in this case, and expressly stated that the treatment accorded the respondents was "atrocious," to use his own language. The Board held the ship in Melbourne for thirty odd days, and then ordering the cancellation of her charter, left the respond

ents in that distant port to meet their difficulties as best they might. In doing this the Shipping Board repudiated its own written agreement with the respondents that the ore charter might be carried out. Accordingly, the respondents contend that what was clearly the Shipping Board's duty to them may be regarded, in a court of equity, as having been done, "upon the known principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done" (*Taylor vs. Longworth*, 14 Peters 172, 177). It may be noted that what the Court of Claims did was to allow the respondents only the difference between the ore charter and what they received from the Grain Corporation for bringing back the wheat, eliminating all other items, so the Government cannot claim, and does not claim any inequity. The respondents were entitled to this, and the Shipping Board, in honor of their own agreement, ought to have assumed this obligation then and there, as Congress authorized and intended they should do.

## POINT II.

**There was a "suspension" and "cancellation" by the Shipping Board of the ship's ore charter, and Section "(a)", "(b)", and the two paragraphs immediately following Section "(c)", also conferred jurisdiction on the Court of Claims to have awarded just compensation.**

The action of the Shipping Board in holding the plaintiff's ship in Melbourne for upwards of a month, and in [illegible] the Australian au-

thorities to refuse clearance to the ship, and ordering the cancellation of her charter, was an "order" for a ship within the meaning of Subsection "(a)" of the statute. The Government's counsel hardly mention the application of this subsection, but by implication appear to say that it refers only to orders for the *construction* of a ship. However, the authority conferred by Subsection "(a)," "*to place an order* with any person *for such ships* * * * which are of the nature, kind and quantity usually produced or capable of being produced by such person," are not the words which would be employed to mean only an order for the *building* or *construction* of a ship. The persons referred to in this Section "(a)" as capable of "producing" a ship, were the ship-owners as well as the ship-builders, because the word *build* and the word *construct* are so customarily employed in connection with ships that it is reasonable to suppose that one of these words would have been used if its generally accepted meaning alone was intended. On the other hand, the word "produce" is a more comprehensive term, and in its usual sense applies to the act of supplying or making available for use a completed ship. Referring to a dictionary on the authority of *Nix v. Hedden* (149 U. S. 304), there will be found among other synonyms of the word "*produce*," the words *supply* and *furnish*. Accordingly, the persons intended to be included in this Subsection "(a)" of the act as capable of "producing" a ship, were not only those who could *build* but also those those who could furnish or otherwise make available a ship for use.

The foregoing interpretation is consistent with the next succeeding Subsection "(b)" of the

statute, which expressly indicates a distinction between "building" and "production." Furthermore, the wording of the paragraph immediately following Subsection "(c)" shows that the "orders" authorized by the statute were intended to include the requirement "to *build, supply furnish* a ship as follows:

> "Compliance with all orders issued hereunder shall be obligatory on any person to whom such *order* is given, and such *order* shall take precedence over all other *orders and contracts* placed with such person. *If any person owning any ship, charter or material* * * * shall refuse or fail to comply therewith, or to give to the United States such preference in the execution of such order, *or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered*, at such reasonable prices as shall be determined by the President, the President may take immediate possession, etc."

Accordingly, when the Shipping Board assumed control of the plaintiffs' ship, and ordered the suspension and cancellation of her ore charter, it was reasonably within the exercise of the authority conferred by Subsection "(b)" "to modify, *suspend, cancel* or requisition any existing or future contract for the building, *production*, or purchase of ships or material."

The Government's counsel cannot reasonably deny, that Congress intended by the foregoing to provide that just compensation should be made for the suspension and cancellation of a contract for the "building" of a ship, but they imply to Congress the extraordinary in-

tent of favoring the owner of a contract for an uncompleted ship, over the owner of a contract pertaining to a completed ship. But in this contention the Government's counsel are not supported by the debates in Congress concerning the provisions of the Act at the time it was up for passage. These debates show it was the purpose of Congress to give to the Shipping Board, through the President, a sovereign power to do with ships, or ships under construction, *or contracts affecting either*, anything thought necessary for governmental purposes. There is no intimation that the owners of *contracts* for ships under construction were to be favored over the owners of contracts pertaining to completed vessels.

The following remarks of the Chairman of the Appropriation Committee of the House indicates the unlimited scope of the Act, and it will be noted that in his statements about the *suspension* and *cancellation* of private contracts, there is no suggestion that these terms were intended to apply only to contracts for ships in process of construction:

> "The proposed amendment which the House is asked to adopt is simply the rearranging the Senate amendment in more logical form and differs from it in four principal respects: First, it gives power to *suspend* contracts as well as to cancel, modify or requisition. In the Senate provision there was no authority to *suspend* a *contract between private parties*, which might interfere with the Government requisitioning *or requiring work to be done*."
>
> * * * * *
>
> "This legislation is of a very radical, unique, and unusual character. It con-

> fers the most comprehensive powers *ever proposed* upon the President of the United States. It authorizes him to requisition the entire output of a factory, to take over ships, *to cancel contracts*, to assume contracts, *to suspend contracts*, to operate those ships * * *" (Cong. Rec., Vol. 55, Part 3, p. 3015).

If the narrow interpretation sought to be placed on this statute by the Government's counsel were the correct one, this legislation would not be extraordinary at all—it would not be the slightest enlargement upon the 5th Amendment to the Constitution in respect of the obligation to make just compensation for the "taking" of private property.

Accordingly, it follows that the plaintiffs are entitled to just compensation for their losses on account of the authority so exercised by the Shipping Board, under the final paragraph of the act which states:

> "Whenever the United States shall *cancel*, modify, *suspend*, or requisition *any* contract, make use of, assume, occupy, requisition, acquire or *take* over any plant or part thereof, or *any ship*, *charter*, or material, in accordance with the provisions hereof, it shall make just compensation therefor. * * *"

## POINT III.

**The decision in this case is justified by the facts, peculiar to it, including the Shipping Board's retraction from its own agreement with respondents, and in any event there is no question of a precedent involved, for the following reasons:**

(1) The Emergency Shipping Fund provisions of the Act under consideration were repealed by Section 2, Chapter 250, of the Merchants Marine Act of June 5, 1920 (41 Stat. 988), and hence the question presented is not a live one in the sense that it involves the application of an existing statute.

(2) By reason of the six-year statute of limitations, no further suits similar to the one at bar may be commenced (Jud. Code, No. 156; 36 Stat. 1139), and furthermore there are no similar claims now in litigation (R., 3).

(3) The decision of the Court of Claims is entirely consistent with its interpretation of the statute involved, in other cases, particularly *Meyer Scale & Hardware Co. v. United States* (57 Ct. Cls. 26), which will be mentioned further below (*infra*, p. 20).

### Concerning Authorties Cited in Petitioners' Brief.

Four cases are cited in the petitioners' brief, but we respectfully say that none of these cases applies for reasons which will be briefly stated.

In *Omnia Company vs. United States*, (261 U. S. 503), a claimant was denied compensation for

the frustration of a contract which gave claimant the opportunity to purchase a large quantity of steel from a steel plant. The damages claimed were held to be too remote under the circumstances that claimant had made no payments under the contract, and the United States had not had any direct dealings with claimant or its property. But the circumstances of the case at bar are essentially different. The Shipping Board held respondents' ship in Melbourne for a considerable period and ordered her charter to be cancelled in violation of an agreement, which respondents had relied upon, and incurred heavy expenses in carrying out for more than five months.

*The American Smelting and Refining Company vs. United States*, was first decided by the Court of Claims (55 Ct. Cl. 466, *affirmed* 259 U. S. 75), and its application in the case at bar was urged at great length before the Court of Claims. However, the Court decided from the record, as a matter of fact, that the agreement between the respondents and the Grain Corporation was an independent transaction entirely without the intervention of the Shipping Board. Accordingly, in arguing the application of this case to the present one the Government's counsel fail to take into consideration an important fact, as the Court of Claims correctly viewed it, namely that no terms were offered by the Shipping Board after the cancellation of the ore contract, and hence there was nothing the respondents could do other than accept the best terms they could obtain from a third party. The Grain Corporation was a commercial corporation organized under the laws of

Delaware* (footnote), and it had no identity in fact or law with the Shipping Board, and in a legal sense it had no identity with the United States (*Bank of Georgia vs. United States*, 22 U. S. 333), although the United States owned the stock of the corporation.

The Board issued orders to the Australian authorities not to clear the ship unless she be loaded with wheat, and under that handicap left the respondents to shift for themselves. Hence, the Board not offering in any way a substitute charter to the respondents, and not being a party to the agreement between them and the Grain Corporation, the respondents had a right to take such hire as was offered by a third party without relinquishing their claim for the immediate and direct losses occasioned by the Shipping Board's intervention. Otherwise, any agreement by which a party may contract with a third party in mitigation of damages would serve to release the wrong doer for the breach of his contract.

The decision in *Union Petroleum Co. vs. United States* (18 F. [2d] 752), has to do with a state of facts quite similar in principle to those in the *Omnia* case, and accordingly, the claim was held to be too remote.

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*The "Food Administration Grain Corporation" was organized under the laws of Delaware, pursuant to Executive Order No. 2681 (August 14, 1917), under the provisions of the Food Control Act of August 10, 1917 (40 Stats., 279).

The judgment of the Court of Claims herein is consistent with the decision of that Court in *Meyer Scale and Hardware Co. vs. United States* (57 Ct. Cls. 26). While the facts in the *Meyer Scale* case are not similar to those under consideration, the Court of Claims in that case went exhaustively into the legislative history of the Act, stating that this was done in anticipation of other cases to arise, requiring the application of the Statute in question, and in answer to the same arguments for the narrow construction contended for in the case at hand, the Court said:

> "The words, '*modify*,' '*suspend*,' '*cancel*' and '*requisition*' are each of plain, well-understood meaning and each has its proper function in the accomplishment of the intended purpose. Combined, they covered the whole field of necessary operations so far as contracts were concerned, to the end that they might be found necessary to the accomplishment of governmental purposes. • • •
>
> "The Act in question provided for compensation in case the Government should exercise powers conferred as to *cancelling, modifying, suspending or requisitioning contracts*, taking over plants, etc., *and the measure is 'just compensation.'*"

**Conclusion.**

A similar act of Parliament has been construed to cover the losses from the destruction of a private contract, in a case which did not involve such a direct and immediate loss as the present one, because there had been no previous agreement on the part of the governmental

agency. (*Elliott Steam Tug Co. vs. The Shipping Comptroller* [1922], 1 K. B. 127).

The judgment of the Court of Claims sustains the principle that the respondents are entitled to be placed in the position they would have been in if the Shipping Board had kept its agreement and not cancelled the ore charter. The judgment does not place the respondents in this position by a wide margin, because they were allowed nothing for the expropriation of their ship in Melbourne, and other items of expense attributable directly to the Shipping Board's actions. However, the judgment is right in principle, and Government's Counsel admit that no inequity has been done. (*Brief in Support of Petition for Writ*, p. 9). If they desired to have this ship bring back wheat, they should have paid what the services were worth, instead of cancelling the respondents' charter and leaving them more or less helpless in the hands of a third party. This was an abuse of authority and an implied promise arose under the circumstances irrespective of the Shipping Board's violations of its own agreement.

For the reasons stated, it is respectfully asked that the judgment be affirmed.

Respectfully,

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Attorney for Respondents.

The Munsey Building,
Washington, [illegible], 1928.